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**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

CHARLES RATHBUN,

Plaintiff - Appellant,

v.

MARK JOHNSON; et al.,

Defendants - Appellees,

and

VICKI BALLINGER; et al.,

Defendants.

No. 04-16128

D.C. No. CV-00-06713-OWW

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Eastern District of California  
Oliver W. Wanger, District Judge, Presiding

Submitted November 8, 2005<sup>\*\*</sup>

Before: WALLACE, LEAVY, and BERZON, Circuit Judges.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

California state prisoner Charles Rathbun appeals pro se from the district court's order dismissing his action for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). We have jurisdiction under 28 U.S.C. § 1291. We review the district court's determination that a prisoner failed to exhaust available administrative remedies de novo and review its findings of fact for clear error. *Ngo v. Woodford*, 403 F.3d 620, 622 (9th Cir. 2005). We reverse and remand.

The district court decided this case before our decision in *Ngo v. Woodford*, *id.* In this case, as in *Ngo*, the prisoner's grievance was rejected as untimely, and the prisoner challenged the untimeliness finding; this was sufficient to exhaust available administrative remedies. *See id.* at 625 (noting that after the Appeals Coordinator rejected a California state prisoner's challenge regarding the timeliness of his grievance, the prisoner-plaintiff "could go no further in the prison's administrative system; no remedies remained available to him").

Accordingly, we reverse the district court's order granting defendants' motion to dismiss and remand for consideration of Rathbun's claims on the merits.

**REVERSED and REMANDED.**